Petition

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81-1200

No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

R. D. BROWN,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Following the admission by an F.B.I. agent that he had knowingly made misrepresentations and material omissions in two state criminal trials and a grand jury proceeding, petitioner brought claims under an amendment to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), which permits actions against the United States arising out of certain intentional torts by federal law enforcement officers. Petitioner alleged, *inter alia*, violation of his constitutional rights. The court of appeals affirmed the dismissal of the claims because it found that the United States may be liable under Section 2680(h) only for claims based upon state law and not for claims like those involved in *Bivens* v. *Six Unkown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The question presented is whether a party, without a remedy under state law, may assert claims against the United States under Section 2680(h) for constitutional torts like those in *Bivens*.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 653 F.2d 196 (5th Cir. 1981). The opinion of the district court (App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1981. A timely petition for rehearing was denied on September 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes which this case involves are as follows:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District

Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

"The provisions of this chapter and section 1346(b) of this title shall not apply to —

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* § 2680(h).

STATEMENT OF THE CASE

This case arose from what a judge of the Texas Criminal District Court described as "the most unconscionable abuse of governmental and prosecutorial and investigative authority . . . that I have ever been personally connected with." (App. D, *infra* at 25a). Petitioner R. D. Brown was president of the First State Bank of Vernon, Texas. During an examination of the bank in July 1973, state and federal banking agencies discovered a check "kite" perpetrated by several cotton

brokers.[1] As a result, the bank was closed, and state and federal investigations of the kiting scheme were begun. These investigations were placed under the supervision of Lee Stephens, an F.B.I. agent with expertise in banking matters.

Since it appeared that the bank had suffered substantial losses from the check fraud, federal and state grand juries were convened.[2] Petitioner and Agent Stephens testified before the grand juries. The federal grand jury indicted the perpetrators of the check kite, but did not indict petitioner. The state grand jury, however, indicted petitioner for conspiracy to commit theft and aggravated perjury.

The criminal cases against petitioner proceeded to trial in the Texas Criminal District Court in April and June of 1976. Agent Stephens testified in both trials. During the course of Agent Stephens' testimony in petitioner's trial for conspiracy to commit theft, Agent Stephens admitted that he had knowingly given false testimony and made material omissions in the grand jury proceedings and the criminal trials concerning petitioner's putative involvement in the check kite. In the case for aggravated perjury, the jury acquitted petitioner. In the case for conspiracy to commit theft, the court directed a verdict of acquittal. The judge of the Texas Criminal District Court stated:

> "I am going to say this, that I always thought that J. Edgar Hoover could walk on water, and the FBI could do no wrong, but many things I have read lately bother me, and particularly what I have seen in this case.
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> . . . .

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[1] A check "kite" essentially involves writing checks against a bank account lacking the funds to cover the checks. The "kite" is supported by the "wind" of deposits to this account of checks drawn on another account also lacking funds to cover the checks.

[2] Neither the F.D.I.C. nor the bank's stockholders ultimately suffered any loss. Due to a rise in the price of cotton, the perpetrators of the kite had sufficient assets to cover the amount of the fraud.

> And frankly . . ., I think something should be done about Mr. Stephens. I think this matter should be presented to the Grand Jury of Wilbarger County, what he has done — even by his own admission, it is perjury and there is no punishment he can ever suffer as great as this man has suffered." (App. D, *infra* at 24a-25a).

Petitioner filed suit in the federal district court for the Northern District of Texas against Agent Stephens and respondent United States in January 1978 under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* (FTCA).[3] Petitioner alleged claims of malicious prosecution and violation of his rights under the Fourth and Fifth Amendments of the Constitution. Petitioner predicated his claims upon a 1974 amendment to the FTCA, *id.* § 2680(h), which waived the government's sovereign immunity for claims arising out of certain intentional torts, including malicious prosecution, committed by federal law enforcement officers.

The district court considered only petitioner's claim for malicious prosecution. It held that under Texas law petitioner was required to prove (1) the commencement of a criminal action against him; (2) the prosecution was caused by the defendant or through the defendant's aid or cooperation; (3) the criminal action was terminated in plaintiff's favor; (4) the plaintiff was innocent; (5) the defendant acted without probable cause in prosecuting the plaintiff; (6) the defendant acted with malice; and (7) the criminal proceedings damaged the plaintiff. Putting the question of damages to one side, the district court determined that petitioner had proven all of the elements of malicious prosecution except malice.[4] It specifically found that

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[3] Petitioner complied with all conditions precedent to filing a lawsuit under the FTCA. He voluntarily dismissed his claims against Agent Stephens prior to trial.

[4] The parties stipulated that Agent Stephens was acting within the scope of his employment when he testified in petitioner's two criminal trials and the grand jury proceeding.

Stephens did not act in good faith in testifying about petitioner and thus acted without probable cause. (App. B, *infra* at 14a-15a). The district court, however, declined to infer malice from this finding and entered judgment for respondent.

The court of appeals affirmed the lower court's dismissal of the malicious prosecution claim because it determined that the finding that Stephens acted without malice was not clearly erroneous. (App. A, *infra* at 4a). The court then considered petitioner's constitutional claims, even though the district court had not passed upon them, in order to determine whether such claims provided any grounds for reversing or vacating the decision.

The court of appeals construed the 1974 amendment to the FTCA, examined its legislative history and relationship to 28 U.S.C. § 1346(b), and interpreted this Court's decision in *Carlson* v. *Green*, 446 U.S. 14 (1980). The court acknowledged clear indications in the legislative history that the 1974 amendment was designed to create actions against the United States like that involved in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (App. A, *infra* at 6a-7a). However, it also noted that section 2680(h) makes section 1346(b) applicable to claims arising out of the torts listed in section 2680(h), and that section 1346(b) specifies that the "law of the place" shall apply to such claims. *Carlson* had stated at one point that this reference to the "law of the place" requires application of state law to FTCA actions. The court regarded this statement, which it acknowledged to be *dictum*, as dispositive. It held that *Carlson* required the application of state law and precluded *Bivens*-type actions under the FTCA. (App. A, *infra* at 8a-9a). Since petitioner had failed to make out a malicious prosecution claim under Texas law, the court of appeals affirmed the district court judgment.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question regarding the scope of the waiver of sovereign immunity contained in the 1974 amendment to the FTCA. Its decision is squarely in conflict with the decision of another federal court of appeals and contrary to decisions of this Court. In contrast with the decision below, the Fourth Circuit has determined that the 1974 amendment permits the assertion of *Bivens*-type actions against the United States. *Norton* v. *United States*, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). Contrary to the court of appeals' application of *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court has not faced this question before. The Court, however, has recognized Congress' intent to make the 1974 amendment the counterpart to *Bivens*, *id.* at 20, and affirmed the importance of applying a uniform federal standard to govern violations of constitutional rights, *id.* at 23-25.

If allowed to stand, the decision below will frustrate the intent of Congress. In enacting the 1974 amendment to the FTCA, Congress clearly intended to allow parties injured by the misconduct of federal law enforcement officials to sue the United States for intentional torts as defined by state law *and* for constitutional torts as defined by federal law under *Bivens* and its progeny. Moreover, the decision below will leave petitioner without a remedy for an egregious violation of his rights under the Fourth and Fifth Amendments.

This Court should grant certiorari to eliminate the conflict of decisions among the courts of appeals, to clarify its decision in *Carlson*, to construe authoritatively the 1974 amendment to the FTCA, and to afford petitioner the opportunity to have his constitutional claims heard in federal district court.

I. The Court Of Appeals' Decision Is In Conflict With The Decision Of The Court Of Appeals Of Another Circuit

The decision below is squarely in conflict with the decision of the Court of Appeals for the Fourth Circuit which has held that the 1974 amendment to the FTCA permits actions based not only on state law, but also on federal constitutional law. *Norton* v. *United States*, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). In *Norton*, an action was brought against the United States under section 2680(h) for violation of the plaintiff's Fourth Amendment rights after F.B.I. agents had forcibly entered and searched the plaintiff's apartment without a search warrant. The government argued that, under the state law of *respondeat superior* and established FTCA precedent, it could assert defenses available to its agents; thus, it defended the suit on the ground of the F.B.I. agents' good faith and reasonable belief in the lawfulness of their actions.

The Fourth Circuit found that section 2680(h) was enacted to create a cause of action against the United States in the *Bivens* context. *Id.* at 394. Although the court regarded it as incongruous that Congress should have used the FTCA as its vehicle since section 1346(b) makes state law controlling in the typical FTCA case, it held that "the scope of governmental liability under the 1974 amendment presents essentially a question of federal law." *Id.* Moreover, the court noted:

> "Despite the amendment's placement in FTCA, we are convinced that the waiver of sovereign immunity to *Bivens*-type liability is *sui generis* and therefore the structure of FTCA, prior cases construing other provisions of FTCA or general principles of *respondeat superior* in interpreting the 1974 amendment, singly or in combination, does not answer the question before us." *Id.* at 395 n.8.

Thus, instead of looking to a particular state's doctrine of *respondeat superior*, the court examined the legislative history

of the amendment and held that the government could assert the good faith defense of its agents. *Id.* at 394-96.

The legislative history of the 1974 amendment amply supports the decision of the Fourth Circuit. Congress enacted the amendment in response to the infamous "no-knock" raids of federal narcotics enforcement agents in Collinsville, Illinois. The Senate Government Operations Committee stated in the final report on the amendment that it deprived the government of its sovereign immunity defense when federal law enforcement agents committed certain torts, including false arrest and malicious prosecution. S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973). The Senate report, however, did not limit the United States' liability to torts under state law:

> "The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. . . . *Furthermore*, this provision should be viewed as a counterpart to the *Bivens* case and its progenty [*sic*], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).
>
> . . . .
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> This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved *Fourth Amendment constitutional torts*. . . . However, *the Committee's amendment should not be viewed as limited to constitutional tort situations* but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law." *Id.* (emphasis added).

Thus, the Committee made clear that the 1974 amendment created vicarious liability for the government when its law enforcement agents committed state law torts *and* constitutional torts like those involved in *Bivens*.

In addition, the drafters of the Justice Department and Senate proposals — the two principal versions of the waiver of sovereign immunity — stated their intention at a number of points during the drafting process that the United States be liable for tort claims arising under the Constitution and that such claims be determined in accordance with federal law. Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N. Carolina L. Rev. 497, 510, 511 n.71, 514 (1976).[5] For example, the Senate Committee accepted the Justice Department's proposal that the government's liability under the amendment be determined by federal law, and stated in a memorandum that "it is intended that the courts look to the *Bivens* case, and the cases that have arisen as a result of that decision" as well as precedent under Section 1983 and the FTCA. *Id.* at 514-15.

The decision of the Fifth Circuit in this case frustrates the intent of Congress. It is well-established under the decisions of this Court that in construing a statute a court should be guided by congressional intent. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713-14 (1975) (court must not be guided by single sentence but by provisions and objects of whole law); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule that a thing may be within the letter of the statute

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[5] One of the authors was a staff member of the Senate Committee responsible for the Senate version. The authors acknowledged that, due to the desire to achieve compromise, the drafters did not pay attention to the "peculiar idiosyncracies" of the FTCA, including the potential applicability of section 1346(b). Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N. Carolina L. Rev. 497, 516 (1976).

and yet not within the statute, because not within its spirit, nor within the intention of its makers.") The reference to section 1346(b) in section 2680(h) — apparently ill-considered — should be deemed only to refer to Congress' desire to grant jurisdiction to the federal courts to consider *Bivens*-type actions against the United States. Federal law perforce applies to constitutional torts like those involved in *Bivens;* to apply state law to federal constitutional claims would turn the question of liability on its head as well as render the Constitution subservient to state law. This Court should construe the 1974 amendment to give effect to Congress' clear intention, and permit petitioner to assert his constitutional claims in district court.

II. The Court Of Appeals' Decision Is In Conflict With The Decisions Of This Court

The decision below relied heavily upon this Court's decision in *Carlson* v. *Green*, 446 U.S. 14 (1980). The court of appeals' reliance, however, rested upon a misapplication and misinterpretation of that decision. In *Carlson*, the Court considered two questions: (1) Is a remedy available directly under the Constitution against individual federal officers given that the allegations could also support a suit against the United States under the FTCA? and (2) if so, is survival of the cause of action governed by federal common law or state statutes? *Id.* at 16-17. Neither of these questions is involved in this case. Indeed, since *Carlson* concerned a *Bivens*-type action against *individuals*, not an action against the *United States* under section 2680(h), the decision is largely irrelevant to this case.

The court of appeals pointed in particular to the Court's comment that under section 1346(b) an FTCA action exists only if the state in which the alleged misconduct occurred would permit a cause of action to go forward. *Id.* at 23. This comment — which the court of appeals recognized was not essential to the holding in *Carlson* — should be interpreted as only a statement of the law generally applicable to FTCA actions.

Even if the Court were referring to the law specifically applicable to section 2680(h) as amended, its comment may well have been a reference to the torts enumerated in that section, to which state law undoubtedly applies, not to constitutional torts, for which Congress intended the section to be the remedy.

In contrast to the inference drawn by the court of appeals, the Court stated elsewhere in its opinion that it is "crystal clear" that the FTCA and *Bivens* are "parallel, complementary causes of action." *Id.* at 20. The Court also recognized the desirability of a uniform federal standard to govern violations of constitutional rights. *Id.* at 23-25.

The Court has confirmed the importance of providing for injuries consequent upon a violation of constitutional rights and of applying federal law to protect those rights. *Davis* v. *Passman*, 442 U.S. 228, 241-42 (1978); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394-95 (1971). The injuries inflicted by federal officials acting under color of law should not be left to the "vagaries of common law actions." *Id.* at 409 (Harlan, J., concurring).[6] *Davis* and *Bivens* involved actions against federal officials, but the need for the application of a uniform federal standard to violations of constitutional rights is of even greater importance when the United States is the defendant.

These considerations counsel strongly for finding that petitioner may bring an action for violation of his Fourth and Fifth Amendment rights against the United States under section 2680(h). Petitioner suffered an unconscionable abuse of author-

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[6] For example, the relationship between the "probable cause" and "malice" elements of an action for malicious prosecution is in dispute among the states. *Compare Fort Wayne Mortgage Co.* v. *Carletos*, 95 Mich. App. 752, 291 N.W.2d 193 (1980) (malice may not be inferred from lack of probable cause) *with Cohen* v. *Cook*, 62 Tenn. App. 292, 462 S.W.2d 502 (1969), *aff'd*, 224 Tenn. 729, 462 S.W.2d 499 (1970) (malice may be inferred from lack of probable cause).

ity by a federal law enforcement officer. Agent Stephens, the federal law enforcement officer responsible for investigating the check kite, lied about the petitioner to a grand jury and in two criminal trials. As a result, petitioner, an innocent man, was arrested and put in jeopardy of criminal conviction. This abuse of authority deprived petitioner of his rights to due process and to be secure from unreasonable seizure. *See, e.g., States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (4th Cir. 1974); *Bethea* v. *Reid*, 445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972). Left to the vagaries of state law, petitioner is without a remedy. Petitioner should at least be given the opportunity to assert his constitutional claims in federal district court.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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December 1981

Appendix

APPENDIX A

Decision Of The Court Of Appeals
August 10, 1981

R. D. BROWN, Plaintiff-Appellant,

v.

The UNITED STATES of America,
Defendant-Appellee.

No. 80-1163

United States Court of Appeals,
Fifth Circuit.
Unit A
Aug. 10, 1981

Appeal From The United States District Court
For The Northern District Of Texas.

Before RUBIN and GARZA, Circuit Judges, and SUTTLE,* District Judge.

ALVIN B. RUBIN, Circuit Judge:

This is an action under the Federal Tort Claims Act (FTCA) against the United States. R. D. Brown seeks to recover damages on the ground that an F.B.I. agent by giving false testimony to a state grand jury and two state criminal juries, maliciously prosecuted Brown and violated Brown's fourth and fifth amendment rights. The district court dismissed the complaint, finding that the agent acted without malice; the court failed to discuss Brown's constitutional claims. We affirm, holding that, as to the malicious prosecution claim, the district court committed no error in finding that Brown failed to prove that the agent acted with malice. We also conclude that Brown's constitutional claims are not cognizable under the FTCA.

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* District Judge of the Western District of Texas, sitting by designation.

I.

In July, 1973, Texas State and Federal Deposit Insurance Corporation bank examiners discovered a check "kite" by a depositor in the First State Bank at Vernon, Texas. [1] The bank was closed and placed in receivership. Because the "kite" was used to finance the purchase of cotton, and the cotton later increased dramatically in value, the amounts recovered from the perpetrators of the "kite" and from the bank's assets were sufficient to avert any loss to the F.D.I.C. or to the bank's stockholders.

Lee Stephens, an F.B.I. agent supposedly expert in accounting and banking matters, was assigned to investigate the possibility that violations of federal banking laws had occurred. He arrived in Vernon after the bank had been closed, and, during the investigation, supervised the activities of a staff of thirty-eight, including F.B.I. agents and personnel of the Texas Department of Safety.

A federal grand jury returned an indictment against the kite-flyers and they were later convicted. The case against Mr. Brown, president of the bank, was also presented to a federal grand jury but it returned no indictment. A state grand jury investigated the matter. In accordance with the federal policy of cooperation with state law enforcement officials, Mr. Stephens testified before the grand jury. After an indictment was returned, Stephens later testified in each of the criminal trials that resulted. Mr. Brown was acquitted in each.

II.

Recognizing that those who act for the State are fallible, that public servants may in the course of their duties injure others, and that the policy should redress such harm, Congress partially waived the

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[1] In essence, a "kite" consists of a bank depositor writing checks against a bank account lacking the funds to cover the amount of the checks, relying on either hope or deceit to ensure that the necessary funds will be deposited before the check is presented to the bank for payment. *See Sutro Bros. & Co. v. Indemnity Insurance Co.*, 264 F.Supp. 273, 283 (S.D.N.Y. 1967), *aff'd* 386 F.2d 798 (2d Cir. 1967). The kite is usually supported by the wind of depositing to the same account checks drawn on another account that in fact lacks funds to honor the checks.

United States' sovereign immunity from tort claims by enacting the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq*. The statute, however, continued to assert immunity for certain intentional torts, including malicious prosecution. *See* Federal Tort Claims Act, ch. 646, § 2680(h), 62 Stat. 984 (1948). In 1974, Congress amended the FTCA to permit actions "arising" from these willful torts when committed by federal "investigative or law enforcement officers." *See* Pub.L.No. 93-253, § 2, 88 Stat. 50 (1974), codified at 28 U.S.C. § 2680(h). Because, as the government has conceded, Stephens was an "investigative officer," Brown's malicious prosecution claim was properly brought under the amendment.

The grant to federal district courts of jurisdiction to maintain FTCA claims provides for governmental liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the *law of the place* where the act or omission occurred." 28 U.S.C. § 1346(b) (emphasis supplied). This requires us to look to the tort law of the state where the federal agent acted. *United States* v. *Muniz*, 374 U.S. 150, 153, 83 S.Ct. 1850, 1853, 10 L.Ed.2d 805, 809 (1963); *Bettis* v. *United States*, 635 F.2d 1144, 1147 (5th Cir. 1981); *Mundt* v. *United States*, 611 F.2d 1257, 1259 (9th Cir. 1980) (suit under 28 U.S.C. § 2680(h)).

The trial judge held that, to recover damages for malicious prosecution in Texas, the plaintiff must prove seven elements: (1) a criminal action was commenced against him; (2) the prosecution was caused by the defendant or with his aid; (3) the action terminated in the plaintiff's favor; (4) the plaintiff was innocent; (5) the defendant acted without probable cause; (6) the defendant acted with malice; and (7) the criminal proceeding damaged the plaintiff. This is a correct statement of Texas law. *See Bass* v. *Metzger*, 569 S.W.2d 917, 924 (Tex.Civ.App. 1978).

The first three elements were stipulated. After a five day trial, the trial judge held that Brown was in fact innocent and that Stephens acted without probable cause. However, he found that Stephens acted without malice. The determination of malice in malicious prosecution cases is a question of fact. *Nesmith* v. *Alford*, 318 F.2d 110, 123 (5th Cir. 1963), (applying Alabama law) *cert. denied*, 375 U.S. 975,

84 S.Ct. 489, 11 L.Ed.2d 420 (1964); *Gleghorn* v. *Koontz*, 178 F.2d 133, 136 (5th Cir. 1949) (applying Texas law); *Good Holding Co.* v. *Boswell*, 173 F.2d 395, 399 (5th Cir. 1949), *cert. denied*, 338 U.S. 815, 70 S.Ct. 55, 94 L.Ed. 493 (1949). On appellate review, such conclusions are reversible only if clearly erroneous. Rule 52(a), Fed.R.Civ.P.

The government has not contested the district court's finding that Stephens acted without probable cause. We must determine only whether the court's finding that Stephens acted without malice is clearly erroneous.

The district court properly recognized that under Texas law, malice may be inferred from the lack of probable cause or from a finding that the defendant acted in reckless disregard of the other person's rights. *Bass* v. *Metzger*, 569 S.W.2d at 923. The inference is permissible, but not inevitable.

With ample support from the record, and the benefit of personal evaluation of Stephen's testimony, the district court found that, while Stephens had made a number of incorrect statements, the "misstatements were not intentional and resulted from motives other than a malicious desire to prosecute Mr. Brown." The district judge also found that during the federal investigation, "Mr. Stephens had always behaved impartially toward Brown even to the extent of providing that District Attorney with certain exculpatory evidence." Because the conclusion that Stephens acted without that malice indispensable to liability has substantial support in the record and is not plainly contraindicated, we accept it as not clearly erroneous without condoning Stephen's unprofessional behavior. We, therefore, affirm the dismissal of Brown's malicious prosecution claim.

III.

The district court said nothing about the constitutional claims set forth in the complaint. We must, however, consider whether they provide any ground for either reversing the district court's decision or vacating for further findings of fact. *See Armstrong* v. *Collier*, 536 F.2d 72,77 (5th Cir. 1976).

In his complaint, Brown alleged that Stephen's actions violated rights guaranteed by the fourth and fifth amendment. These claims have never been explicated at any length. As best as we can determine, Brown contends that the giving of false testimony violated the fourth amendment by leading to Brown's arrest without probable cause and violated the fifth amendment by denying Brown due process before a state grand jury and during two state jury trials. These claims are problematic at best; we cannot consider them, however, unless we determine that the United States has waived its sovereign immunity from these claims, enabling the district court to exercise jurisdiction.

In essence, Brown seeks to bring a *Bivens* action under the FTCA against the United States. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court held "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials." *Id.* at 395, 91 S.Ct. at 2004, 29 L.Ed.2d at 626. *Bivens* also recognized, however, that the United States did not become vicariously liable for constitutional torts of its officials, reaffirming the accepted doctrine that the United States had not waived its sovereign immunity from such actions.

If Congress has dropped the sovereign shield, it did so in the same 1974 amendment that forms the basis for Brown's malicious prosecution action. *See Birnbaum* v. *United States*, 588 F.2d 319, 327-28 & n.18 (2d Cir. 1978); *Norton* v. *United States*, 581 F.2d 390, 393 & n.3 (4th Cir. 1978), *cert. denied*, 439 U.S. 1003, 99 S.Ct. 613, 58 L.Ed.2d 678 (1978). The language of the amendment opens for decision to related questions: whether the government accepted liability only for the six common law torts listed in the amendment or whether its waiver is broader and extends to any constitutional deprivation that might arise out of actions similar to those torts; and, in either event, whether the definition of the cause of action is determined by the law of the state where the allegedly wrongful act was committed or whether it reaches further and provides governmental responsibility for every action for which an individual officer would himself be liable under *Bivens*. While the answer to these questions may be different, we consult the same sources in considering them.

Read in isolation, the amendment might appear to sanction recovery not only for the six torts but to all claims for constitutional violation that arise from such tortious acts:

> The provisions of this chapter and Section 1346(b) of this title shall apply to any claim *arising*, on or after the date of the enactment of this provisio, *out of* assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

Pub.L.No. 93-253, § 2, 88 Stat. 50 (1974), codified at 28 U.S.C. § 2680(h) (emphasis supplied). The words "arising . . . out of" are broad, and might embrace actions predicated on (thus "arising out of") the same operative facts, even though the legal theory of liability, violation of constitutional rights, is different. The legislative history suggests that, at least under some circumstances, Congress intended to provide a new remedy for any violation of constitutional rights. In large measure, the amendment was Congress' reaction to the *Bivens* decision in 1971 and a series of illegal raids by federal narcotics investigators in Southern Illinois.[2] Expressing his outrage at the raids, Senator Percy of Illinois called for a direct remedy against the government for violations of constitutional rights committed by federal agents.

> Surely, the Federal treasury is large enough to indemnify citizens whose *constitutional rights* have been blatantly violated.

(Emphasis added.) S.Rep.No. 93-469, 93d Cong., 1st Sess. 29, 36 (1973) (individual views of Sen. Percy).

Senators Percy and Ervin subsequently introduced what became the 1974 amendment to the FTCA as an amendment to the "Reorganization Plan No. 2 of 1973," an act reorganizing federal drug law

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[2] Boger, Gitenstein, & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L.Rev. 497, 500-17 (1976), contains an excellent discussion of the amendment's legislative history.

enforcement. The report accompanying the amendment dealt explicitly, though ambiguously, with *Bivens* and constitutional torts. [3]

The language of the statute, however, limits governmental submission to court jurisdiction for constitutional torts by explicitly subjecting all actions brought under the proviso to "the provisions of . . . Section 1346(b)." In relevant part, Section 1346(b) states that tort actions against the United States may be brought

> where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The explicit language of the proviso does not permit a litigant to escape the "law of the place" limitation. While federal law is, of course, "law of the place" as well (so long as the place is within the United States), the phrase as used in Section 1346(b) refers exclusively to state law. *Carlson* v. *Green*, 446 U.S. 14, 23, 100 S.Ct. 1468, 1474, 64 L.Ed.2d 15, 26 (1980); *Birnbaum* v. *United States*, 588 F.2d 319, 327-28 (2d Cir. 1978). In *Carlson*, the Court considered

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[3] The report recites:

> *Furthermore*, this provision should be viewed as a counterpart to the *Bivens* case and it progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which the case imposes liability upon the individual Government officials involved).
>
> This whole matter was brought to the attention of the Committee in the context of the Collinsville [Illinois] raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendment should not be viewed as limited to constitutional tort situations.

S.Rep.No.93-588, 93d Cong., 2d Sess. 3, *reprinted in* [1974] Code Cong. & Ad. News, 2789, 2791. In light of this strong language, it would not have been surprising had Congress enacted a provision clearly allowing *Bivens* actions, at least in those cases in which state law failed to provide an adequate analogue. Instead, however, Congress enacted the narrower, more ambiguous provision we construe today.

whether Congress meant to preclude *Bivens* actions against individuals by enacting the 1974 amendment. Relying in part on the Senate Report language quoted *supra*, note 3, the Court concluded that *Bivens* actions were permissible actions "complementary" to the remedy provided by the 1974 amendment to the FTCA. 446 U.S. at 18, 100 S.Ct. at 1472, 64 L.Ed.2d at 23. Although the Court did not directly consider the scope of FTCA actions, Justice Brennan, writing for the majority, noted that there are significant distinctions between *Bivens* and FTCA actions and stated one of these:

> an action under FTCA exists *only if* the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred.") Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.

446 U.S. at 23, 100 S.Ct. at 147 64 L.Ed.2d at 26 (emphasis supplied). A concurrence by Justice Powell and a dissent by Justice Rehnquist also concluded that all claims under the Act must meet the "law of the place" requirement. *See* 446 U.S. at 28 n.1, 100 S.Ct. at 1477 n.1, 64 L.Ed.2d at 30 n.1 (Powell, J., concurring); 446 U.S. at 31 n.3, 100 S.Ct. at 1479 n.3, 64 L.Ed.2d at 33 n.3 (Rehnquist, J., dissenting). Justice Brennan's statement, of course, is dicta, not precedent, but it is an integral part of the rationale for the opinion and, therefore, provides enlightenment even if not command. [4] *See United States* v. *Bell*, 524 F.2d 202, 206 & n.4 (2d Cir. 1975). *Carlson* thus instructs us that the liability of the United States under the Act arises only when the law of the state would impose it. As a "creation of

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[4] In *Norton* v. *United States*, 581 F.2d 390 (4th Cir. 1978), *cert. denied*, 439 U.S. 1003, 99 S.Ct. 613, 58 L.Ed.2d 678 (1978), the Fourth Circuit relied on the Senate Report and concluded that the 1974 amendment was a "*sui generis*" provision allowing *Bivens* actions against the United States unrelated to other provisions of the Federal Tort Claims Act, presumably including Section 1346(b). *See* 581 F.2d at 395 n.8. (The government had conceded the applicability of Section 1680(h).) This portion of *Norton* is no longer tenable in light of *Carlson* v. *Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), which was concerned, specifically, with actions brought under the 1974 amendment.

federal law," *Carlson*, 446 U.S. at 23, 100 S.Ct. at 1474, 64 L.Ed.2d at 26, a *Bivens* action cannot be brought under the Act. [5] Because Brown has cited no theory, constitutional or otherwise, on which Texas would impose liability for false testimony given to state grand or petit juries in the absence of malice, we dismiss Brown's constitutional claims for lack of jurisdiction as not sanctioned by "the law of the place."

We leave for another day the question whether, as one court has held, a constitutional tort action "arising out of" one of Section 2680(h)'s six enumerated torts is viable under the Act if sanctioned by "the law of the place." *See Birnbaum* v. *United States*, 436 F.Supp. 967, 983-86 (S.D.N.Y. 1977) (Weinstein, J.), *aff'd on other grounds*, 588 F.2d 319 (2d Cir. 1978).

The judgment of the district court dismissing the complaint is AFFIRMED.

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[5] Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup.Ct.Rev. 281, 356-57 (arguing that the "land of the place" requirement should, therefore, be repealed).

APPENDIX B

Decision Of The District Court
January 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CIVIL ACTION NO. CA-6-78-4

R. D. BROWN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

The plaintiff's case under the Federal Tort Claims Act was heard by the court without a jury on the days of August 1, 2, 3, 4, 6, and 7, 1979. After hearing and considering the evidence, the pleadings, and arguments of counsel, the court files this memorandum opinion which shall constitute the court's findings of fact and conclusions of law in this case.

In July of 1973, bank examiners from the State Banking Department of the State of Texas and the Federal Deposit Insurance Corporation were engaged in an examination of the First State Bank at Vernon, Texas. During the course of this investigation, a "kite" was discovered and the bank was closed and placed in the hands of a receiver. Eventually none of the depositors, stockholders, or creditors suffered any loss because the assets of the bank and the perpetrators of the "kite" were sufficient to cover any possible losses and neither the Federal Deposit Insurance Corporation nor any sureties on bonds were required to pay any moneys to cover these possible losses.

The "kite" involved the operations of the Huntley Cotton Company, owned by a Mr. Huntley and a Mr. Hemphill, and in July of

1974 these persons were indicted by a state grand jury and were subsequently convicted. Huntley Cotton Company was a large buyer and seller of cotton in the West and North Texas areas and a large part of the operations was carried on with drafts with warehouse receipts attached, drawn on the Huntley account at the First State Bank at Vernon, Texas. Similar transactions occurred in other banks in western Oklahoma and in Texas. At the Vernon bank, when the drafts on Huntley with warehouse receipts attached or any other check whether authorized or not, were presented for payment by the Federal Reserve Bank or other banks in the form of "cash letters," the bank would process these items through its proof machine. Ordinarily, and in the absence of any request from the customer, checks would then be run through the bookkeeping department and debited to the various accounts. Huntley had requested that all of the checks drawn on his account or drafts drawn against him or his company be diverted from the bookkeeping machine (after being processed through the proof machine) and these were placed in the possession of Mrs. Guggesberg, an assistant cashier of the bank. During the day, Mr. Huntley or one of his employees would inspect these checks and drafts, known as "white checks" and would give a "green check" for the total amount and accordingly the white checks and drafts would not be processed through bookkeeping where they ordinarily would be photographed. On the same day the green check would be run back through the proof machine with the proper credits and debits, and sometime during the day, and often during the evening and night, a deposit would be made by Huntley to cover the green check. This would ordinarily be done in time to permit the deposit, usually in the form of checks drawn against other banks or drafts against other companies, to be placed in a cash letter and forwarded through the Federal Reserve system by courier. From the time that the green check was received and until the deposit was made later in the day, there were ordinarily reserve funds on hand in the Huntley account sufficient to cover the green check but the deposit was made in the checking account in time to cover the green check without disturbing the reserve account. In any event, by "kiting" such deposits through various banks, Huntley Cotton Company was able to finance their operations even though a decline in cotton prices had made the business unprofitable at that particular time. Because of the drastic increase in the price of cotton in the following

year or years, Huntley was eventually able to repay any loss to the bank and prevent loss to the stockholders and others.

The State District Attorney was notified by the State Bank Commissioner of possible criminal proceedings and the State District Attorney requested the assistance of the Texas Department of Public Safety and the Attorney General in investigating the matter. Also the Federal Bureau of Investigation was notified and Mr. Lee Stephens, a long-time FBI agent with expertise in accounting and banking matters, was sent to investigate the possibility of criminal violations in the federal area.

Mr. Stephens arrived in Vernon after the bank had been closed and it was on this occasion that he first met Mr. R. D. Brown, the Chairman of the Board and the chief executive officer of the bank. Mr. Stephens supervised the investigation and there were thirty-eight FBI agents and investigators and accountants from the Texas Department of Safety under Mr. Stephens' direction and supervision. This investigation lasted for several months.

Ultimately the Huntley group was indicted and convicted but Mr. Brown was not indicted or tried with these parties. Subsequently a state grand jury indicted Mr. Brown on a conspiracy to commit felony theft and on aggravated perjury charges. He was tried on each of these indictments in state court in Fort Worth, Texas and in each case was acquitted, once by a jury verdict and once by a directed verdict.

The case against Mr. Brown was also presented to a federal grand jury in Wichita Falls, Texas but no indictment was returned.

R. D. Brown has now filed suit against the United States of America alleging a cause of action based upon malicious prosecution. The acts which Mr. Brown charges the Government with are those which were performed on the part of Mr. Lee Stephens as the investigating agent in charge for the Federal Bureau of Investigation.

Specifically, the plaintiff charges Mr. Stephens with malicious prosecution when he appeared and testified in July of 1974 before a state grand jury in Wilbarger County, Texas; when he appeared and testified on or about May 3, 1976 as a prosecution witness for the State of Texas in the trial of Mr. R. D. Brown for aggravated perjury;

and when he also appeared at the trial of Mr. Brown for conspiracy to commit felony theft on June 7 and 8, 1976, in Fort Worth, Texas.

To recover damages for malicious prosecution in Texas, the plaintiff must prove: (1) the commencement of a criminal action against him; (2) the prosecution was caused by the defendant or through the defendant's aid or cooperation; (3) the criminal action was terminated in the plaintiff's favor; (4) the plaintiff was innocent; (5) the defendant acted without probable cause in prosecuting the plaintiff; (6) the defendant acted with malice; (7) the criminal proceedings damaged the plaintiff. *Bass* v. *Metzger*, 569 S.W.2d 917 (Tex. Civ. App. — Corpus Christi 1978, writ ref. n.r.e.).

Elements (1), (2), and (3) are stipulated. The court ruled from the bench, and here reaffirms, that the plaintiff has proved in this trial by a preponderance of evidence his innocence of the criminal charges, element (4). Because of its disposition of elements (5) and (6), the court does not reach the question of damages, element (7). The dispute in this case centers around the elements of the lack of probable cause and malice. These elements of the action are closely related. If a lack of probable cause is found, malice may be inferred from it. *Eans* v. *Grocer Supply Co., Inc.*, 580 S.W.2d 17, 22 (Tex. Civ. App. — Houston [1st Dist.] 1979, no writ; *Biering* v. *First National Bank*, 69 Tex. 599, 7 S.W. 90 (1888).

For the purposes of the tort of malicious prosecution, probable cause is defined to exist when, in good faith, a complainant in a criminal case makes a full and fair disclosure of the facts known to him. Unless the complaining party acts in good faith in disclosing to the prosecuting authority all material facts known to him, "probable cause" does not exist. *Eans* v. *Grocer Supply Co., Inc.*, 580 S.W.2d at 21.

Malice may consist of ill will or evil motive, of course. In malicious prosecution cases, however, malice also may be inferred from a lack of probable cause or from wrongful conduct in reckless disregard of the rights of another. *Bass* v. *Metzger*, 569 S.W.2d 917 at 922-923.

This court believes that Leland Stephens acted without probable cause, but also without malice.

PROBABLE CAUSE:

Leland Stephens told the Wilbarger County grand jury that R. D. Brown must have known of the kite because Brown knew of the large amounts of cotton supposedly being bought and sold by Huntley during June 1973, a time of year when, according to Stephens, no cotton is available for sale. It is true that there is no cotton available in June from *growers*, but dealers have cotton for sale in June. In fact, the Huntley Cotton Company had 38,000 bales of cotton valued at about $9.5 million in its warehouses immediately following the closing of the First State Bank of Vernon.

Stephens told the grand jury that Brown in 1972 had to "scrape up" $720,000.00 from the shareholders to cover the sorry loans he had made to other people. Truthfully, this was a routine recapitalization made in 1973 for only $350,000.00, and Brown and his family, as major shareholders, bought most of the shares issued in the new recapitalization. Stephens later admitted that he knew at the time he said it to the grand jury that the recapitalization was not done to make up for "sorry loans Brown made to other people."

Stephens told the grand jury that Huntley's green checks were hot checks which the assistant cashier had to hold until the following day's business because otherwise there would be nothing to post them against. In actuality, the assistant cashier sent the green checks to proof immediately upon their receipt, and the green checks were treated in all ways like all routine incoming items, proofed on their first day in the bank, posted and photographed and filed on their second day in the bank.

Regarding the cancelled white checks, Stephens told the grand jury that R. D. Brown allowed Huntley's employees to "pick them up without a record" and that these white checks were not run through the proof machine. This was not true. Each incoming check was run through the proof machine although not through the bookkeeping machine where they ordinarily would have been photographed, but they were photographed by the transmitting banks and listed on the

incoming cash letter tape. Each such check was also listed on the proof tape prepared in the First State Bank immediately upon its arrival at the bank. Each such item could be identified from the proof tape or the cash letter tape, and a picture of the item could be obtained from the transmitting bank. None of this was disclosed to the grand jury or to the Wilbarger County District Attorney who relied almost exclusively upon Stephens for his understanding of the banking procedures. This was important because the prosecutor's explanation for the long duration of the kite without detection was that there were no records of the white checks. Stephens did not correct this misunderstanding on the part of the District Attorney.

Stephens made other misstatements and material omissions in addition to those listed above. This court, therefore, finds that Stephens did not act in good faith in making his disclosures to the Wilbarger County District Attorney and grand jury and therefore did not act with probable cause. *See Eans* v. *Grocer Supply Co., Inc., supra.*

MALICE:

Although this court has determined that Mr. Stephen's misstatements to the grand jury and his failure to inform the grand jury of certain exculpatory facts concerning Mr. Brown indicate a lack of good faith which support the finding of no probable cause on the part of the Government's agent, the facts in this case are not sufficient to support a finding that Mr. Stephens acted with the requisite legal malice. Mr. Stephens' supervision of a large number of agents and investigators, the long period of time over which the conduct of the bank's business with the Huntley interests was investigated, and the voluminous and complicated nature of the transactions involved indicate that Mr. Stephens' misstatements and omissions were not intentional and resulted from motives other than any malicious desire to prosecute Mr. Brown.

The plaintiff contends that Stephens' behavior toward him was aggressive and accusatory during the interviews of mid-1973 and that the presentation of Mr. Stephens' testimony to the grand jury was overly zealous and it was at times careless. There is contradictory

testimony from the former United States District Attorney that Mr. Stephens had always behaved impartially toward Brown even to the extent of providing that District Attorney with certain exculpatory evidence. But mere carelessness or simple negligence alone do not constitute malice in a malicious prosecution case. Based upon the same facts and for the same reasons the court finds that there was no reckless disregard of Mr. Brown's rights.

Although there were no losses to the stockholders or depositors, the bank was closed by order of the properly constituted authorities and the record is replete with examples of irregularities and criminal conduct by some of the people involved in these transactions. There was evidence that Mr. Brown had instructed the employees of the bank as to the mechanics to be used in processing items on the Huntley account, even directing them to be available for late night deposits, and furnishing the employees with a car in which to come to the bank to take these late deposits. Further, Mr. Brown had told many of the employees of the bank, including members of the Board of Directors, that he personally handled the Huntley line of credit and seemed to resent anyone questioning anything about it. There were warehouses in which Huntley cotton was stored which were owned by Huntley rather than by third parties and certain discrepancies have been reported by the bank examiners to exist in one or more of these warehouses. Even after these discrepancies were discovered, the bank paid over $1 million in drafts drawn on the Huntley account although the evidence shows that this was done by authority of some of the bank examiners. Investigators had reported to Mr. Stephens that as far back as 1970 the employees of the Huntley Cotton Company had been instructed to cease cancelling warehouse receipts so that these same warehouse receipts could be used over and over again in several banks even though the cotton had been previously sold. A polygraph test taken by some of the bank employees substantiated information learned by Mr. Stephens during the course of his investigation.

Several of the grand jurors who were called to testify in this case testified that they would have voted to indict Mr. Brown even though all of the testimony given by Mr. Stephens before the grand jury had been deleted. This certainly does not indicate that his manner of presenting the testimony to the grand jury was done in a malicious or vindictive manner toward Mr. Brown.

With all of the facts known by Mr. Stephens and made known to him by those working under his direction, it became his duty as a law enforcement officer to present same to the proper authorities, and his failure to do so would have been a dereliction of duty. The fact that his presentation did in many instances contain errors and omissions which showed a lack of probable cause, the facts are equally clear in this case that it was done without any intent on his part to harm Mr. Brown, without any personal animosity toward him, and without any wrongful motive.

The evidence also very clearly established that Mr. Stephens, who is the only person acting on behalf of the United States of America in this case, very strongly recommended against any criminal prosecution of Mr. Brown to the United States Attorney and the United States followed this recommendation.

The court recognizes that malice may be inferred by the fact finder from the lack of probable cause or if it finds that the defendant acted in a reckless disregard of a person's rights. *Bass* v. *Metzger, supra; J. C. Penney Company* v. *Gilford*, 422 S.W.2d 25 (Tex. Civ. App. — Houston, 1967, writ ref. n.r.e.) at 28, but such inference is rebutted by the evidence before this court. The evidence in this case compels this court to find that Mr. Stephens was not actuated by wrongful motives in the prosecutions involved and in spite of the court's finding that there was lack of probable cause, legal malice is not present in the absence of a wrongful motive. This court is unable to and does not find or infer malice on the part of Stephens or any reckless disregard of plaintiff's rights.

Judgment will be entered for the defendant United States of America and all costs assessed against the plaintiff.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 9th day of January A.D. 1980.

/s/ _____

HALBERT O. WOODWARD
Halbert O. Woodward
Chief Judge
Northern District of Texas

APPENDIX C

Judgment Of The District Court
January 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CIVIL ACTION NO. CA-6-78-4

R. D. BROWN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This action came on for trial before the Court, the undersigned Judge presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff, R. D. Brown, take nothing of the defendant, United States of America, and that the action be dismissed on the merits.

All costs are taxed against the plaintiff.

The Clerk will furnish a copy hereof to each attorney.

ENTERED THIS 9th day of January A.D. 1980.

/s/ _____
HALBERT O. WOODWARD
Halbert O. Woodward
Chief Judge
Northern District of Texas

Order On Petition For Rehearing
September 29, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1163

R. D. BROWN,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal From The United States District Court
For The Northern District Of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 10, 1981,
5 Cir., 198__ , ____ F.2d ____).
(September 29, 1981)

Before RUBIN and GARZA, Circuit Judges, and SUTTLE*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

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* District Judge of the Western District of Texas, sitting by designation.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____

ALVIN B. RUBIN
Alvin B. Rubin
United States Circuit Judge

APPENDIX D

Excerpt From The Statement Of Facts In The Texas Criminal District Court, Tarrant County June 8, 1976

No. 5854

THE STATE OF TEXAS

v.

R. D. BROWN

In The Criminal District
Court Number Three
Tarrant County, Texas

STATEMENT OF FACTS

June 8, 1976

VOLUME V

PROCEEDINGS

June 9, 1976; 9:00 a.m.

THE COURT: Who is your next witness, Mr. Neal?

MR. NEAL: At this time the State rests.

THE COURT: Will you all step back in the jury room.

(The jury retires to the jury room and the following proceedings take place outside the presence of the Jury.)

THE COURT: Well, late night I read and reread the law of conspiracy, the definition of circumstantial evidence, meditated about this case. There are two things I could do. I could let a jury find him not guilty, or I could save everybody the time and go ahead — I think I am going to instruct a verdict of not guilty.

I will say this: I think the State has done a good job of presenting what they had. I don't think they have anything. I guess I could have copped out by letting the Jury do it because I have the feeling there is a lot of politics involved, and by letting the Jury do it — more likely get the monkey off my back and say, "Well, they did it," but I just can't see that a case has been proved — so bring them back in.

(The Jury is seated in the jury box and the following proceedings take place.)

THE COURT: Ladies and gentlemen, when you were empaneled, or at least during voir dire examination last Tuesday, I think it was explained to you that you as jurors are judges of the facts of the case and the Court cannot encroach upon your duties in passing upon questions of fact. The Court's only duty is passing upon questions of law. My thoughts, after reading and re-reading the law in this case, and considering the facts, I think as a matter of fact the State has not proved a case against the Defendant. I am going to instruct a verdict of not guilty.

I am going to ask that you retire to the jury room, select your foreman and return a verdict reading, "We, the Jury, under instructions of the Court, find the Defendant not guilty."

I think I may have explained to you — I guess I didn't explain to you, when we have less than twelve jurors, the law does require that each juror sign the charge.

So in this particular case I will ask the bailiff to hand you the charge. Select your foreman and return the verdict I give to you here.

(At 9:10 a.m. the Jury is retired to the jury room to begin their deliberations.)
(At 9:30 a.m. the Jury is seated in the jury box and the following proceedings are had.)

THE COURT: Ladies and gentlemen, have you arrived at a verdict?

FOREMAN JONES: We have, Your Honor.

THE COURT: Mr. Jones, this is your verdict: "We, the Jury, under instructions from the Court, find the Defendant not guilty."

Thank you, you may be seated.

Ladies and gentlemen of the Jury, I again want to thank you for your service. I have had an impression — I haven't granted many instructed verdicts, I guess more in civil cases than I have in criminal cases, and sometimes I get the impression that jurors resent the Court's telling them what verdict to return.

I assure you I am not trying to usurp your authority, but honestly after reviewing the law and the facts, this was the only verdict you could return, and I hope that you think that you do not think that your service has not been useful or to no avail. It has.

This case has been disposed of, and I want you to know I appreciate your service. You have been under an obligation of secrecy and silence. As soon as you're discharged from service in this case, you will be permitted to talk about the case in any way that you want to.

I have a bad habit of saying what I think, and there is one thing about this case that really bothered me . . . now I'm a red-necked former prosecutor who has been accused of thinking everybody ought to be in the penitentiary at least once, and some people twice. But I am going to say this, that I always thought that J. Edgar Hoover could

walk on water, and the FBI could do no wrong, but many things I have read lately bother me, and particularly what I have seen in this case.

To me, and maybe I shouldn't say this, but I want you to know how I feel about it. To me, the witness, Lee Stephens committed, to me, what was the most unconscionable abuse of governmental and prosecutorial and investigative authority by any government authority that I have ever been personally connected with.

Here we had a federal officer whose duty and job is to not only prosecute the guilty, but to protect the innocent. But here we have him going before a Wilbarger County Grand Jury and, in his own words, expecting them to believe him, and then intentionally and knowingly — I expect I wrote down the words — in his words he "left the Grand Jury with misrepresentations as to Mr. Brown's background and his conduct and his conduct in this particular matter." To me that is unconscionable and what he did to this Defendant — there is no way that Mr. Brown can ever be compensated for the humiliation, the embarrassment that he and his family have suffered.

And frankly, Mr. Neal, I think something should be done about Mr. Stephens. I think this matter should be presented to the Grand Jury of Wilbarger County, what he has done — even by his own admission, it is perjury and there is no punishment he can ever suffer as great as this man has suffered.

I hate to get off on this — I wanted to get — as I say, as I say I am bad about saying what I think.

I did enjoy seeing you all, and if you are ever in Wichita Falls, come by and see me.

(The proceedings on this matter were closed.)

Opposition

No. 81-1200

Supreme Court, U.S.
FILED
MAR 30 1982
L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

R.D. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may bring an action for damages against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, on the basis of an alleged violation of the Fourth and Fifth Amendments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 653 F. 2d 196. The opinion of the district court (Pet. App. 10a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1981. A timely petition for rehearing was denied on September 29, 1981 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on December 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action for damages under the Federal Tort Claims Act (hereinafter "FTCA"), 28 U.S.C. 1346(b), 2671 *et seq.*, arising out of petitioner's indictment and prosecution by the State of Texas on charges of conspiracy to

commit theft and aggravated perjury. Petitioner, who was acquitted of both charges, alleges that his Fourth and Fifth Amendment rights were violated by the false testimony of an FBI agent before the state grand jury that indicted him and at his subsequent criminal trials in state court. Petitioner maintains that he has a cause of action for damages against the United States under the FTCA based upon the agent's alleged constitutional violations.

Petitioner was chairman, chief executive officer, and a stockholder of the First State Bank in Vernon, Texas (Pet. App. 12a). In July 1973, it was discovered that the bank's main depositor, the R.E. Huntley Cotton Company, had perpetrated a massive check and draft "kite" scheme (*id.* at 2a). The Huntley company had used worthless warehouse receipts to support drafts and as collateral for loans (*id.* at 11a).[1]

After the kite was discovered, state and federal investigations were begun (Pet. App. 12a). FBI Agent Leland Stephens coordinated the federal inquiry and supervised the activities of a large staff of federal and state investigators (*ibid.*). As a result of that investigation, five persons affiliated with Huntley were indicted and convicted on federal charges (*ibid.*).

At the request of the county District Attorney and the United States Attorney, Agent Stephens testified before a state grand jury about the Huntley "kite" (Pet. App. 2a). After hearing the testimony of Agent Stephens and other witnesses, the state grand jury indicted petitioner and four Huntley employees for conspiracy to commit theft (*ibid.*). Later, after hearing testimony by additional witnesses, the same grand jury also indicted petitioner for aggravated perjury (*id.* at 12a). Agent Stephens testified at petitioner's

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[1] For further details of this scheme, see *United States* v. *Huntley*, 535 F. 2d 1400 (5th Cir. 1976), cert. denied, 430 U.S. 929 (1977).

trials, but petitioner was acquitted of both charges (*id.* at 2a).

Petitioner then sued the United States under the FTCA, alleging that Agent Stephens' testimony before the state grand and petit juries constituted malicious prosecution (Pet. App. 1a). Relying on *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), petitioner also asserted a damages claim against Agent Stephens in his individual capacity for alleged violations of his Fourth and Fifth Amendment rights.[2] However, petitioner later consented to the dismissal with prejudice of his claim against Agent Stephens. Petitioner then amended his complaint to seek damages from the United States under the FTCA for the constitutional violations that Agent Stephens had allegedly committed.

After a trial, the district court dismissed petitioner's complaint. Applying Texas law, as required by 28 U.S.C. 1346(b), the district court found that Agent Stephens had not acted with malice, an essential element of the tort of malicious prosecution (Pet. App. 15a). The court found that Agent Stephens made "misstatements" in his grand jury testimony and failed to inform the grand jury of certain exculpatory facts, but the court also found that "Stephens' misstatements and omissions were not intentional and resulted from motives other than any malicious desire to prosecute [petitioner]" (*ibid.*). In addition, the court found that there had been "no reckless disregard of [petitioner's] rights" (*id.* at 16a). The district court did not separately discuss petitioner's constitutional claims.

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[2]As the court of appeals observed (Pet. App. 5a): "These claims have never been explicated at any length. As best we can determine, Brown contends that the giving of false testimony violated the fourth amendment by leading to Brown's arrest without probable cause and violated the fifth amendment by denying Brown due process before a state grand jury and during two state jury trials."

The court of appeals affirmed (Pet. App. 1a-9a). It upheld the district court's finding concerning Agent Stephens' lack of malice (*id.* at 2a-4a) and held (*id.* at 4a-9a) that petitioner's constitutional claims, to the extent that they differed from his malicious prosecution claim, were barred by sovereign immunity because the waiver contained in the FTCA applies only "if a private person * * * would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)). The court wrote (Pet. App. 9a):

> Because [petitioner] has cited no theory, constitutional or otherwise, on which Texas would impose liability for false testimony given to state grand or petit juries in the absence of malice, we dismiss Brown's constitutional claims for lack of jurisdiction as not sanctioned by "the law of the place."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is unwarranted.

1. Petitioner does not seek review of the dismissal of his FTCA claim against the United States for malicious prosecution. As noted, petitioner was not entitled to recover under the Texas law of malicious prosecution because the trial court found that Agent Stephens acted without malice (Pet. App. 15a-17a). That factual finding was upheld on appeal (*id.* at 2a-4a).

Petitioner contends, however, that Agent Stephens' lack of malice does not preclude recovery against the United States on his Fourth and Fifth Amendment claims. But the court of appeals correctly held (Pet. App. 4a-9a) that petitioner's constitutional claims, insofar as they differ from his malicious prosecution claim, are barred by sovereign immunity.

As this Court recently reiterated in *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980):

> It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued * * *, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969).

See also *Dalehite* v. *United States*, 346 U.S. 15, 17, 30 (1953) (involving FTCA). Thus, unless Congress expressly waived sovereign immunity for claims such as petitioner's, dismissal of those claims was required.

Petitioner errs in arguing that sovereign immunity was waived by a 1974 amendment to the FTCA. From the time of its enactment in 1946 to the present, the government's liability under the FTCA has been limited to "circumstances where * * * a private person * * * would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The government's liability is further narrowed by 28 U.S.C. 2680, which excludes many types of tort claims from the FTCA's waiver of sovereign immunity. Before 1974, 28 U.S.C. (1970 ed.) 2680(h) provided such an exclusion for:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

In 1974, Congress added the following proviso to 28 U.S.C. 2680(h):

> *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United

> States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

In enacting that provision, however, Congress did not alter 28 U.S.C. 1346(b), which makes the United States liable only if "a private person * * * would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Indeed, the 1974 amendment to 28 U.S.C. 2680(h) makes express reference to 28 U.S.C. 1346(b). Thus, the effect of the 1974 amendment is simply to waive sovereign immunity for certain intentional *common law torts*, when committed by law enforcement officers.

The amendment plainly does not waive sovereign immunity for damages claims based solely upon alleged violations of the Constitution. First, the proviso added to 28 U.S.C. 2680(h) merely lists certain common law torts and makes no reference to constitutional violations. Second, 28 U.S.C. 1346(b) limits the government's liability to "circumstances where * * * a private person * * * would be liable," and the actions of private individuals cannot violate the Constitution. Cf. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). Third, 28 U.S.C. 1346(b) also provides that the government's liability is to be determined "in accordance with the law of the place where the act or omission occurred," and it is settled that the term "law of the place" refers to state, not federal, law. *Carlson* v. *Green*, 446 U.S. 14, 23 (1980). Thus, as the court of appeals held (Pet. App. 4a-9a), petitioner's claims against the United States based upon Agent Stephens' unintentionally false testimony had to be dismissed because petitioner could not have recovered from a private defendant on such claims under any legal theory recognized by Texas law.

Petitioner does not contend that the FTCA expressly waives sovereign immunity for claims like his, but he maintains (Pet. 8-10) that Congress *intended* to enact such a waiver. Thus, petitioner's argument is doomed by the established rule that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed' " (*United States* v. *Mitchell, supra*, 445 U.S. at 538, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)).

Moreover, petitioner's argument could not succeed even if this case involved a simple question of statutory construction, rather than the issue of sovereign immunity. As this Court recently noted (*United States* v. *Turkette*, No. 80-808 (June 17, 1981), slip op. 3 (citation omitted)):

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

Here, petitioner does not contend that there is any ambiguity in the statutory language, which unequivocally imposes liability on the United States only to the extent that "a private person * * * would be liable" and requires application of "the law of the place" (28 U.S.C. 1346(b), 2680(h)). Thus, the court of appeals correctly concluded that Congress had not exposed the United States to claims such as those in petitioner's complaint.

The legislative history is fully consistent with the unambiguous statutory language. Relying primarily upon a passage from the Senate report concerning the 1974 amendment (S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973)), petitioner contends (Pet. 8-9) that Congress intended to permit a damages action against the United States whenever a suit could be brought against an individual agent under *Bivens*. However, petitioner reads far too much into

the report's general language. The report merely suggests that Congress intended to permit common law tort actions against the United States in certain cases in which *Bivens* actions might also be available against individual agents. The report does not indicate that Congress intended to authorize *Bivens* actions against the United States. Indeed, because of the many limitations upon the right to recover under the FTCA (see *Carlson* v. *Green*, *supra*, 446 U.S. at 20-23), it seems highly unlikely that Congress could have possessed such an intent.

Petitioner relies (Pet. 9) upon the statement in the report (S. Rep. No. 93-588, *supra*, at 3) that the 1974 amendment "should be viewed as a counterpart to the *Bivens* case," but a "counterpart" is not an exact equivalent. The report also states (*ibid.*) that the amendment "waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." However, a claim founded upon the "type of conduct that is alleged to have occurred in *Bivens*" (*ibid.*; see 403 U.S. at 389) would constitute a claim arising out of the common law torts of "assault, battery, false imprisonment, [or] false arrest" for which recovery is permitted under 28 U.S.C. 2680(h). Finally, the report states (S. Rep. No. 93-588, *supra*, at 4) that the "amendment should not be viewed as limited to constitutional tort situations." This means only that recovery under Section 2680(h) would be allowed for any of the enumerated torts even if the investigative or law enforcement officer's conduct did not also amount to a constitutional violation. It does not follow that the amendment was intended to waive sovereign immunity for *all* constitutional torts rather than only those torts enumerated in Section

2680(h), many of which, when committed by federal investigative or law enforcement officers, may involve the violation of constitutional rights.[3]

The court of appeals' decision in this case relies upon (see Pet. App. 8a) and is supported by this Court's analysis of the 1974 amendment to the FTCA in *Carlson* v. *Green*, *supra*. Explaining that the liability of the United States under the FTCA differs substantially from that of an individual federal employee in a *Bivens* action, this Court observed (446 U.S. at 23):

> [A]n action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred").

The decision below is also supported by that of the only other court of appeals to confront the question presented here. In *Birnbaum* v. *United States*, 588 F. 2d 319, 329 (2d Cir. 1978), the court stated that "acts or omissions alleged to be unconstitutional * * * would support liability under the Act *only* if they constituted independent torts under state

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[3]Petitioner also cites (Pet. 9) a law review article that relies, in turn, upon materials not readily available to the members of Congress who enacted the 1974 amendment to the FTCA. Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. Rev. 497, 510, 511 n.71 (1976). These materials include the correspondence and conversations of members of the State committee staff, as well as a draft bill that was never introduced. See *id.* at 510 n.66 (draft bill), 511 nn.67, 68, 69 (correspondence), 70 (conversation, correspondence), 71 (correspondence). Such materials may reflect the intent and understanding of certain congressional staff employees, but they shed very little light upon the intent of Congress as a whole.

law" (emphasis in original).[4] The court emphatically rejected (*id.* at 328) the argument petitioner asserts in the case at bar:

> Since Congress restricted the basis for liability under the Act to the "law of the place," we think that it would be a *tour de force* to consider direct violations of the federal constitution as "local law" torts. Such a rule might be tantamount to a bypass of the sovereign immunity of the United States without the consent of Congress. We hold, accordingly, that the claim for relief may not be sustained on that basis.

2. Petitioner contends (Pet. 7-8) that the decision below conflicts with *Norton* v. *United States*, 581 F. 2d 390 (4th Cir. 1978), cert. denied, 439 U.S. 1003 (1978), but his argument lacks merit. *Norton* did not concern the question presented here—whether a plaintiff without a viable state tort claim may nevertheless bring a constitutional damages action against the United States under the FTCA. *Norton* concerned an entirely separate question—whether, in an action against the United States under the FTCA based upon intentional common law torts allegedly committed by its agents, the United States may assert defenses available to its agents when sued in their individual capacities. Thus, the two decisions clearly do not conflict.

It is true, as petitioner notes (Pet. 7), that the *Norton* court regarded "the scope of governmental liability under the 1974 amendment" as "essentially a question of federal law," and therefore the court did not look "to a particular

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[4]Although *Birnbaum* dealt with the FTCA as it existed prior to the 1974 amendment, its rationale is equally applicable here. The 1974 amendment allowing FTCA actions against the United States for certain intentional torts did not change the "law of the place" limitation contained in 28 U.S.C. 1346(b). Indeed, the amendment explicitly incorporated that limitation. See 28 U.S.C. 2680(h). The *Birnbaum* holding construing the "law of the place" language of the FTCA therefore has lost none of its vitality.

state's doctrine of *respondeat superior*, as [it] would in the typical FTCA case" (581 F. 2d at 394; footnotes omitted). However, that portion of the court's opinion did not affect its conclusion or its essential reasoning. As the *Norton* court recognized (*id.* at 397 n.13), "employers are generally entitled under traditional principles of *respondeat superior* to assert all defenses available to their employees." Thus, the real issue in *Norton* was not whether the state or federal law of *respondeat superior* would permit the United States to assert its agents' defenses but whether Congress intended to abrogate those defenses when it enacted the 1974 amendment to the FTCA.[5]

3. The petition in this case should also be denied because it is apparent that petitioner could not recover on his constitutional claims even if Texas law were not controlling. Those claims were not dismissed because of a peculiarity of Texas law. Rather, they were dismissed because Agent Stephens acted without malice[6] (Pet. App. 15a), because "Stephens' misstatements and omissions were not intentional" (*ibid.*), and because "there was no reckless disregard of [petitioner's] rights" (*id.* at 16a). Petitioner has cited no body of law, federal or state, that would permit him to recover under such circumstances. See also note 2, *supra*.

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[5]There are dicta in *Norton* concerning the scope of the government's liability under the 1974 amendment to the FTCA that may be inconsistent both with this Court's subsequent opinion in *Carlson* v. *Green*, *supra*, and with that of the court of appeals in the present case, and petitioner here relies (Pet. 7-8) upon those portions of the *Norton* opinion. However, those erroneous dicta provide no grounds for reviewing the court of appeals' decision in this case.

[6]Proof of malice or an analogous element is universally required in a suit for malicious prosecution. See, *e.g.*, *Restatement (Second) of Torts* §§ 653, 668 (1977); W. Prosser, *Torts* 835, 837-839 (4th ed. 1971); 1 F. Harper & F. James, *The Law of Torts* 320-322 (1956).

Because the district court's findings of fact, which were affirmed on appeal, would preclude petitioner from recovering against the United States on his constitutional claims, even if his legal theory had merit, the question of sovereign immunity presented by his petition is of purely academic interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1982

DOJ-1982-03